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Law and Economics as Interdisciplinary Exchange

Philosophical, Methodological and Historical Perspectives

Edited by
Péter Cserne and Magdalena Małecka

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Introduction

Péter Cserne and Magdalena Małecka

Law and Economics is arguably one of the success stories of interdisciplinary research. The application of concepts and models of standard microeconomics to explain and evaluate legal rules, doctrines and institutions has led to the development of an academic field which seems well established both in an epistemic and an institutional sense. On the one hand, Law and Economics scholars share a common terminology and they believe in the great explanatory power of their models. On the other, they have formed associations, they publish in specialized journals and teach courses and entire specialized programs dedicated to the economic analysis of law.

Yet there are continuing and also nascent doubts about both the coherence and the future of Law and Economics as we know it. Is the behavioral model underlying standard Law and Economics limited or superseded by empirical findings and insights from cognitive psychology? Have efficiency and welfare maximization really managed to replace values such as justice and rights in evaluating laws? Are they still considered superior to other consequentialist evaluative standards such as innovation and growth? How are empirical or theoretical generalizations of economics relevant for and channeled into the core of legal discourse which typically focuses on the particularities of individual transactions and disputes? These and related questions have been addressed in a number of isolated meta-theoretical discourses about Law and Economics in recent years. The goal of this volume is to move this discussion forward.

Through a combination of general reflection on longer trends and detailed case studies on current developments, contributors to the volume analyze whether and in what sense Law and Economics is a successful interdisciplinary endeavor.

Inspired by insights from the philosophy of social sciences, the book shows how concepts travel between legal scholarship and economics, how they change meanings when applied elsewhere and how economic theories and models inform and transform judicial practice. It also asks whether the transfers of knowledge between economics and law are symmetrical exchanges between the two disciplines. In this way the volume provides new insights on the foundations and methods, achievements and challenges of Law and Economics, at a time when both the continuing challenges to academic economics and the

growth of empirical legal studies raise questions about the identity and possible further developments of the project.

By analyzing the diverse aspects of interdisciplinarity, the ambition of this book is to open new perspectives on Law and Economics for both insiders and outsiders. To Law and Economics scholars, it provides inspiration and an opportunity for self-reflection. It can also be a valuable resource for scholars specializing in science studies, the philosophy of economics, the philosophy of social sciences, legal theory and the philosophy of law.

The title of the volume – *Law and Economics as Interdisciplinary Exchange: Philosophical, Methodological and Historical Perspectives* – serves as an organizing principle for the book, where various chapters discuss aspects and cases of how ideas, concepts, models and techniques are transferred and translated: from economics to law and back, from philosophy to policy, as well as from theory to applied work. As far as the analytical framework and conceptual tools are concerned, while the chapters are diverse, they are informed by (and so the volume as a whole relies on) the burgeoning literature on interdisciplinarity in the philosophy and sociology of science and in the methodological literature in legal theory. Some chapters discuss the interaction of law and economics from philosophical or meta-theoretical perspectives. Others explore these issues through case studies which provide in-depth analyses of interdisciplinary practice in theoretical or applied contexts, such as property rights, automobile accidents or consumer protection. In a few cases, the meta-reflection accompanies the discussion of examples. Taking inspiration from the literature on interdisciplinarity, the volume intends to raise the foundational questions in a coherent manner and in this way contribute to a better understanding of Law and Economics as interdisciplinary exchange.

* * *

Some of the most intriguing questions raised by the interdisciplinary character of Law and Economics concern the interplay of epistemic (or internal) and institutional (or external) factors. Economics has been sometimes characterized as imperialistic science. In our context, this suggests that an economic analysis of law, by imposing certain ways of analysis on law and without engaging with alternatives, such as doctrinal or other social scientific analyses of law, is asymmetrical. Such asymmetry may be problematic in either an epistemic or an institutional sense, insofar as it provides a rather limited understanding of law and/or it violates certain norms or values of academic practice. Put differently, if certain modes of analysis dominate Law and Economics, the question arises whether this is due to their inherent worth or the hard or soft institutional power of their proponents.

While we do not attempt to answer *this* question directly, the various chapters, organized in three parts, address three key issues which are pertinent for judging whether Law and Economics is indeed a successful interdisciplinary research project.

First, in what sense can we characterize Law and Economics as a scientific enterprise and how can we locate it within the broader set of possible interactions of the two disciplines? (Part I). Second, which transfers of concepts and methods from economics to legal scholarship have features of symmetric exchanges, and which are asymmetrical, and why? (Part II). Third, in which ways are different kinds of normative reasoning relevant for legal practice informed by economic theory, and what are the tensions between them? (Part III)

Péter Cserne and Piotr Bystranowski in Part I address the first issue. In Chapter 1 Cserne reflects on the types of knowledge various approaches to Law and Economics can produce. Taking into account both insights from the philosophy of science and the practice-relatedness of both economics and legal scholarship, the chapter suggests a typology of the most relevant interactions between the two disciplines – eight types of interdisciplinary exchanges that can feature under the general label of Law and Economics. Thus, Law and Economics is best seen as a plural and heterogeneous set of interdisciplinary exchanges, and while the same can be said about its parent disciplines as well, disagreements within economics and legal scholarship only partly determine the dynamics of Law and Economics as interdisciplinary exchange.

Piotr Bystranowski's Chapter 2 analyzes the ways in which proponents of Law and Economics employ Thomas Kuhn's philosophy of science in order to reflect on the scientific character (and superiority) of their approach. Bystranowski discusses two contexts in which these attempts are made: to justify the scientific status of Law and Economics and to provide an interpretation of the advent of Law and Economics, as well as the subsequent developments of the field. He argues that both attempts of theorizing inspired by Kuhn fail and suggests why this is the case.

Part II asks how methods and analytical tools are transferred between the economic and the legal fields. This transfer of ideas is not necessarily unidirectional. Attempts to employ economics in the study of law and to invoke law in the study of the economy lead to different challenges. This is well illustrated by the contributions of Alain Marciano and Steven G. Medema, Stefano Solari and Aleksandar Stojanović.

In Chapter 3 Alain Marciano and Steven G. Medema show that the application of economic theory to law at the very heart of the Law and Economics movement – the law school of the University of Chicago – was not as straightforward as the conventional histories of the movement suggest. The authors discuss the work of legal scholars in Chicago, Walter J. Blum and Harry Kalven, Jr., who, although immersed in economics and interacting with the main actors of the Law and Economics movement in the early 1950s, largely rejected economics as a possible and useful help for solving legal problems. Blum and Kalven believed that economics and law are grounded in fundamentally incompatible normative visions. Marciano and Medema identify this belief as one of the significant obstacles to the theoretical integration of the two disciplines.

Stefano Solari (Chapter 4) also analyses the incompatibility of law and economics as scientific disciplines, the interaction of which must lead to tensions

in combining and exchanging their basic concepts. Solari pays attention to the different epistemologies underlying these two disciplines and argues that the application of standard economics to law results in oversimplifications and misunderstandings that also create challenges for legal practitioners. These claims and tensions are illustrated and discussed by the author on the basis of the notions of property rights employed in the two fields. Solari argues that they are conceptualized differently, almost radically so, in economics and in law.

Chapter 5 continues scrutinizing the case of economic analysis of property. Aleksandar Stojanović points out that even though this branch of Law and Economics is an exemplary contribution to the field, as well as to economic analysis, it has been recurrently criticized for the inability of its framework of transaction costs and property rights to account for crucial legal aspects of property. Stojanović notices that the discussion of this issue has brought a number of epistemological assumptions to the fore. His chapter adopts the standpoint of the philosophy of interdisciplinarity to evaluate the arguments of both sides of the debate and to suggests potential ways forward.

While single-minded wealth maximization has few adherents these days, Law and Economics faces a number of specific normative challenges stemming from the practical nature of law and the normative character of legal scholarship, as well as the reluctance of economists to directly and openly engage in normative reasoning. Is Law and Economics sufficiently well informed about the values that are involved in individual and collective practical decisions? What are the adequate ways for courts to invoke economic concepts and methods while engaged in value-based normative reasoning? The chapters authored by Patricia Marino, Fabrizio Esposito and Giovanni Tuzet and Silvia Zorzetto in Part III address these issues from three different angles.

In Chapter 6 Patricia Marino brings her work on value pluralism and moral reasoning to suggest that engagement with ethical theory allows for an analysis of issues concerning plural values in Law and Economics. She takes issue with a recent proposal by Eyal Zamir and Barak Medina, who attempt to incorporate deontological morality into Law and Economics. Even though Zamir and Medina intend to go beyond the consequentialist, efficiency-based reasoning in Law and Economics, Marino shows why their effort collapses into a version of consequentialism and why we should be concerned about this. Marino's analysis reveals why it has been so far a challenge for the Law and Economics movement to combine its framework with nonconsequentialist ethical theories and what could be done to overcome this theoretical impediment.

Fabrizio Esposito and Giovanni Tuzet (Chapter 7) propose another alternative to consequentialism: legal inferentialism. They argue that, as normative economics cannot provide us with consensual criteria as to which economic consequences should matter in legal practice, for instance whether lawyers should be concerned with consumer welfare or total welfare, economists should pay closer attention to the normative considerations embodied in legal practice itself. Within the methodological framework of legal inferentialism, which the authors develop, the value choices enshrined in legal reasoning allow the

selection of economic consequences that matter from a legal point of view. They discuss this proposal on the basis of the legal sources of the EU Unfair Contract Terms Directive.

Silvia Zorzetto is also concerned about the impact of Law and Economics' framework on legal practice (Chapter 8). She analyzes transfers of neoclassical economic theories and concepts to judicial decisions and asks whether and to what extent judges in civil law systems are familiar with the Law and Economics approach, as well as whether they rely on it during adjudication. Zorzetto discusses the arguments formulated by Italian courts, mainly in contract and tort cases, and she shows that the influence of Law and Economics there is only apparent. Furthermore, she demonstrates that references to Law and Economics made by Italian judges are often superficial; the economic concepts change their meaning when applied in court and serve to dress up rulings decided on a purely equitable basis rather than on economic criteria or models.